Supreme Court, U.S.
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No. 99-1374

IN THE

Supreme Court of the United States

ANGEL WATKINS,

Petitioner,

v.

PROFESSIONAL SECURITY BUREAU, LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Professional Security Bureau, Limited, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner Angel Watkins filed this action against Respondent Professional Security Bureau, Limited ("PSB") on February 20, 1997 alleging sexual harassment in violation of 42 U.S.C. § 2000e (Title VII of the Civil Rights Act of 1964) while employed at PSB as a result of a sexual assault. *Petitioner's Appendix at 1a-4a.* A jury trial commenced on August 31, 1998 and concluded with an Order of Judgment on September 4, 1998. *Petitioner's Appendix at 5a-9a.* Ms. Watkins presented claims of quid pro quo harassment, sexually hostile work environment, and retaliatory discharge. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.231-A.291.* No claim was asserted against the individual employee alleged to have assaulted Ms. Watkins.

PSB is a contract security guard provider. Ms. Watkins began employment with PSB as a security guard in August 1995. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.233.* Ms. Watkins claims she was the victim of a rape/sexual assault that occurred on May 24, 1996 by her PSB supervisor Edward Kelley at PSB's office in Lutherville, Maryland. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.242-A.248.* Ms. Watkins did not report the sexual assault to PSB until three months later. Moreover, the alleged rape was not reported to the police until September 16, 1996, four months after the claimed assault and following her termination from employment by PSB. No criminal charges were ever filed against Kelley by the local authorities. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.273-A.274.*

In August 1996 Ms. Watkins stated to co-worker Hazel Dowling that Edward Kelley had fondled her, Ms. Watkins did not advise that she was raped. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.17-A.18; A.280-A.281.*

At the time of the assault PSB had a written policy against sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.197.* Specifically, there was a written memorandum from PSB's President posted in the training room at PSB's office in Lutherville, Maryland. The memorandum stated that sexual harassment would not be tolerated. The memorandum provided a phone number to call in the event an employee believed they were subjected to sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.64-A.65; A.198; A.227-A.228.* Each PSB employee was provided with a company employment handbook. A copy of the handbook was also located at each PSB post. The employee handbook stated sexual harassment would not be tolerated and set forth the procedure for reporting complaints about sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.65-A.67; A.198; A.500.* Indeed, Ms. Watkins had prior experience filing claims with the EEOC regarding sexual hostile work environment with a prior employer. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.331.*

When Ms. Watkins reported being fondled by Kelley, per its policy PSB immediately instituted an investigation. Specifically, once Hazel Dowling advised PSB Supervisor Donald Nicola of the purported fondling, Nicola immediately traveled to where Ms. Watkins was working at the time and

interviewed Ms. Watkins about the incident. Again, Ms. Watkins only reported being fondled by Kelley. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.36-A.38; A.76.* After interviewing Ms. Watkins, Nicola prepared a report — *Respondent's Appendix at A.573* — and advised PSB Vice President of Operations Charles Fisher of the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.44; A.77.* Fisher immediately followed up by investigating the incident, and meeting with and interviewing Hazel Dowling regarding the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220.* Fisher also interviewed Kelley by telephone who was out of the office on disability. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.222.* On August 15, 1996 Fisher received a second report from Nicola regarding Nicola's continued investigation of the incident in which Ms. Watkins indicated she did not wish to pursue the matter. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.574.* At that point, Fisher ceased his investigation because Ms. Watkins had not filed a complaint with PSB's Human Resources Department per the sexual harassment policy, Kelley was out on disability and no longer in a position to affect Ms. Watkins' employment or approach her in her employment, and a decision had already been made by PSB to terminate Kelley upon his return from disability leave for unrelated reasons. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220.*

Ms. Watkins was terminated from employment with PSB on September 16, 1996 for reasons wholly unrelated to the incident that is the subject of this litigation. Ms. Watkins had previously been terminated in July of 1996 — before

advising anyone of the sexual assault — for poor performance and misconduct, which included arriving at work without a uniform, bringing her children to work, refusing to report for duty, and failing to call in when arriving and leaving shifts. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.56; A.58; A.59-A.62; A.474-A.476; A.502.* Ms. Watkins was reinstated at Fisher's insistence before her complaint of sexual harassment. Fisher advised Nicola that Ms. Watkins be allowed to "straighten herself out" before being terminated. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.37; A.58-A.59; A.216.* Edward Kelley played no role whatsoever in either decision to terminate or reinstate Ms. Watkins. *Appendix Below In the United States Court of Appeals for the Fourth Circuit Appendix at A.71-A.74.*

Ms. Watkins' second termination on September 16, 1996 was for continued and gross misconduct which led to PSB's loss of the account to where Ms. Watkins was assigned. *Appendix Below In the United States Court of Appeals for the Fourth Circuit A.86-A.91; A.216-A.217; A.228-A.229; A.504.* Nicola made the decision to terminate Ms. Watkins. It was approved by Fisher. Again, Kelley had no role in the termination of Ms. Watkins on September 16, 1996. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.91; A.228-A.230.* Specifically, Nicola testified:

> That Ms. Watkins had locked the keys, which has the master key to all the apartments in the building in the day room, which has the TV. Some of the people there said she was sleeping. She got up to walk out, the door closed behind you and locks and you can't get back in without a key. She left

> the building unguarded, unmanned, went down to the street to the handyman's house, tried to get him to open the door. When he refused to do it, she came back, called up the manager, 5:30, Six O'clock in the morning, saying that the maintenance man would not open the door for her. Because of this, we lost the site, and I terminated Angel.

Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.89. Fisher testified:

> The approval of the termination was based upon — she had deserted her post — well let me back-up on that for a second. In the first case, she was off her post in the facility, as there were keys that were assigned to her that were found in an area where could not have been in, so we knew that she had already been off post in the facility, i.e. TV room.
>
> Secondly, she left the — she walked out of the TV room and left the keys, and the reason we know that is because she had to leave the property to get someone else to let her in to get her keys back. These keys were used to access the emergency areas, let people in and out of the building. Based on, first the keys being found in the TV room, showing that she had been present in an area she shouldn't have been; and secondly, the fact that she had gone up to someone else's home off property showing she left the property which was leaving post, I made the decision to terminate her.

Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.228-A.229.

At the close of Ms. Watkins' case, PSB moved for a directed verdict. PSB's motion was denied. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.322-A.325.* PSB moved again for a directed verdict following presentation of its defense. This motion was also denied. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.374.* Thereafter the jury was charged as to each of the separate claims, quid pro quo harassment, hostile work environment, and retaliatory discharge, as well as the affirmative defenses. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.403-A.407.*

On September 3, 1998 the jury found for PSB on the issue of quid pro quo sexual harassment. The jury found for Ms. Watkins on the issue of hostile work environment and retaliatory discharge. A hearing was held the following day on September 4, 1998 on whether the jury would consider punitive damages. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.416-A.443.* Prior to trial PSB moved *in limine*, in part, to dismiss Ms. Watkins claim for punitive damages. The court reserved its decision on this issue pending evidence presented at trial. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.4, 8/31/98 Docket Minute Entry.* At the September 4, 1998 hearing the court ruled that punitive damages would not be considered by the jury because there was no evidence from which the jury could reasonably conclude that PSB acted with malice or with reckless indifference with respect to Ms. Watkins. *Petitioner's Appendix at 5a-8a.* The court found as a matter of irrefutable

fact that PSB had a written policy since 1991 or 1992 set forth in an employee handbook received by all employees which stated that sexual harassment of any kind would not be tolerated. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.439.* Once Ms. Watkins reported that she had been fondled by Kelley, PSB officials investigated and advised Kelley to have no further contact and to stay away from Ms. Watkins. Moreover, Kelley's act — although reprehensible — did not reflect a continuum of conduct by PSB. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441.*

Following the trial PSB timely filed a written motion for judgment as a matter of law, or in the alternative, for a new trial. *Petitioner's Appendix at 10a.* In a memorandum opinion dated October 22, 1998, the district court granted PSB's motion for judgment as a matter of law or, in the alternative, for a new trial. *Petitioner's Appendix at 28a-34a.* As to the sexually hostile work environment claim, the district court found that based upon the evidence presented at trial, a reasonable jury could only conclude that PSB satisfied the affirmative defense — as set forth in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) — to such a claim, thus PSB was entitled to judgment as a matter of law. *Petitioner's Appendix at 29a-31a.* The district court concluded that although there was sufficient evidence for the jury to conclude Ms. Watkins was subject to a sexually hostile work environment, the overwhelming evidence indicated PSB took reasonable care to prevent and promptly correct Kelley's alleged behavior and that Ms. Watkins failed to take advantage of PSB's established policy on sexual harassment. Accordingly, the district court could not uphold the jury's rejection of PSB's affirmative defense. *Petitioner's Appendix at 30a.*

> In light of the undisputed evidence, the only reasonable conclusion that the jury could reach in this case is that Professional Security exercised reasonable care to prevent and promptly correct the sexually harassing behavior and that Watkins, by not complaining to anyone at Professional Security about the harassment until August 1996, unreasonably failed to take advantage of any preventive or corrective opportunities provided by Professional Security or to avoid harm otherwise. Hence, Professional Security must prevail against Watkins on the affirmative defense to the claim of sexually hostile work environment as a matter of law.

Petitioner's Appendix at 31a.

As to the retaliation claim, the district court found that Ms. Watkins failed to present sufficient evidence from which a reasonable jury could have concluded that the third requisite for a retaliatory discharge had been met, thus entitling PSB to judgment as a matter of law on this claim. *Petitioner's Appendix at 31a-33a.* The district court concluded that although Ms. Watkins presented sufficient evidence from which a reasonable jury could conclude the first two prongs were met — that Ms. Watkins was engaged in a protected activity and that she suffered an adverse employment action against her — there was insufficient evidence for a reasonable jury to have inferred a causal connection between her complaining about the harassing conduct by Kelley and the termination of her employment by PSB. *Petitioner's Appendix at 31a-32a.* Moreover, the district court concluded that even if it were assumed Ms. Watkins presented sufficient evidence on a causal connection, PSB articulated legitimate

non-retaliatory reasons for her termination and that Ms. Watkins failed to offer sufficient evidence that PSB's reasons for the termination were pre-textual. *Petitioner's Appendix at 31a-32a.*

The district court also granted PSB's motion for a new trial in the alternative. *Petitioner's Appendix at 34a.*

Plaintiff appealed the decision of the district court (1) for judgment in favor of PSB notwithstanding the verdict on the issues of PSB's liability for (a) the sexually hostile work environment and (b) retaliatory discharge, (2) dismissal of plaintiff's punitive damages claim, and (3) the alternative relief granting PSB a new trial to the United States Court of Appeals for the Fourth Circuit. In a opinion dated November 15, 1999 the United States Court of Appeals for the Fourth Circuit upheld the ruling of the district court. *Petitioner's Appendix at 35a-37a.* Specifically, the Fourth Circuit held that no reasonable jury could have failed to find that PSB raised and satisfied the affirmative defense — set forth in *Ellerth v Burlington Indus., Inc., supra,* 118 S. Ct. 2257 (1998) — to Ms. Watkins claim of sexual harassment. *Petitioner's Appendix at 43a-46a.* Moreover, with respect to the retaliation claim, the Fourth Circuit held that Ms. Watkins failed to offer any evidence whatsoever that the reason for her ultimate termination by PSB was a mere pretext. *Petitioner's Appendix at 46a-47a.*

SUMMARY OF ARGUMENT

In accordance with this Court's opinions in *Burlington Industries, supra,* and *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998), The United States Court of Appeals for the Fourth Circuit correctly affirmed the district court's

ruling dismissing Petitioner's sexually hostile work environment, retaliatory discharge, and punitive damage claims. The overwhelming evidence was that PSB exercised reasonable care to prevent and promptly correct the alleged sexually harassing behavior in the workplace, and that Ms. Watkins failed to take advantage of the preventive opportunities offered by PSB.

As to the retaliatory discharge claim, the evidence overwhelmingly shows that PSB set forth legitimate and non-retaliatory reasons for Mrs Watkins' termination, and Ms. Watkins failed to offer any evidence in support of her argument that PSB's reasons for her termination were pre-textual.

Petitioner's punitive damages claim was properly dismissed as Petitioner's substantive claims were dismissed as a matter of law. Moreover, there was no evidence whatsoever of any malice or recklessness on the part of PSB.

REASONS FOR DENYING THE WRIT

I. PSB WAS ENTITLED TO ASSERT THE AFFIRMATIVE DEFENSE TO A HOSTILE WORK ENVIRONMENT CLAIM

Petitioner contends in the first point of her Petition for Certiorari that the affirmative defense available to a corporate defendant in a sexually hostile work environment case as set forth in *Burlington Industries*, *supra*, is *not* available where adverse employment action is shown. Petitioner argues that the district court and the United States Court of Appeals for the Fourth Circuit erred in allowing PSB to assert this defense notwithstanding the fact that the adverse employment

action taken against Ms. Watkins was wholly unrelated to the protected activity, i.e., reporting of sexual harassment. This Court, however, has made it unmistakably clear that the affirmative defense set forth in *Burlington Industries* may be asserted by an employer provided there was no adverse employment action taken against the employee that was causally connected to the protected activity of reporting a sexually hostile work environment.

In *Burlington Industries* this Court established a distinction between cases in which tangible employment action was taken against an employee for failure to submit to a supervisor's sexual demands, and those in which no such action was taken. *Burlington Industries*, 118 S. Ct. at 2265. This Court ruled that where tangible adverse employment action is taken that *is* causally related to the protected activity, i.e., complaining of sexual harassment, the employer will be automatically vicariously liable for the actions of its employee. Where, however, no tangible employment action — or tangible employment action wholly unrelated to protected activity — is taken against the complaining employee, the employer may raise the affirmative defense to liability. *Burlington Industries*, 118 S. Ct. at 2270.

Ms. Watkins argued below and in this Petition for Certification that her termination on September 16, 1996 was "adverse employment action", and accordingly PSB is barred from asserting the affirmative defense set forth in *Burlington Industries*. Certainly, termination may constitute adverse employment action. Ms. Watkins, however, as noted by the Fourth Circuit, failed to set forth any evidence whatsoever that her termination resulted from her engaging in the protected activity of reporting a claim of sexual harassment or that it "resulted from a refusal to submit to a supervisor's

sexual demands." *Petitioner's Appendix at 42a*. No evidence was presented that her termination was based on any grounds other than those expressed by PSB — leaving her post — at the time she was terminated. The Fourth Circuit aptly noted that record below clearly evidenced Ms. Watkins' termination was the result of a bona fide non-discriminatory purpose. Ms. Watkins had previously been fired for failure to adhere to company policy and protocol, however, she was re-hired and given a second chance. Both the initial termination and rehire preceded the complaint of sexual harassment. Ms. Watkins' subsequent termination on September 16, 1996 came as a result of additional flagrant violations of company protocol and policy which also resulted in the loss of the account/client to which Ms. Watkins was assigned. Accordingly, the district court and the Fourth Circuit Court of Appeals found that PSB has satisfied its burden of proof as a matter of law as to the affirmative defense.

Under the position advocated by Petitioner, an employee who engages in protected activity, such as complaining about sexual harassment, would then have *carte blanche* authority to disregard any and all policy or protocol of the employer without fear of any adverse action or reprisal by their employer, including bona fide discipline or termination. An employee engaged in the protected activity of reporting a sexual harassment would be free to disregard all job duties, but nonetheless be immune from any reprimand by the employer. Such a result is wholly inappropriate from a public policy standpoint and subjects this employer and co-workers to unmitigated harm from such a "protected" employee. Clearly, this was not the intent of this Court in *Burlington Industries* in enunciating the affirmative defense available to employers in claims alleging sexually hostile work

environment. The resulting disorder that would reign in workplaces from such a policy is apparent and none of the objectives for permitting the defense are served by such a limitation.

II. PSB ESTABLISHED ALL THE ELEMENTS OF THE AFFIRMATIVE DEFENSE TO LIABILITY SET FORTH IN BURLINGTON INDUSTRIES

Petitioner contends in the second point of her Petition for Certiorari that even though the affirmative defense as set forth in *Burlington Industries* may have been available to PSB, the district court and the United States Court of Appeals for the Fourth Circuit improperly ruled that no reasonably jury could conclude that the elements of the defense had not been established by PSB. Petitioner argues that the second element of the defense — that the plaintiff unreasonably failed to take advantage of any preventive or corrective action opportunities provided by the employer or to avoid harm otherwise — was not met.

Not only did the courts below correctly find that PSB was permitted to assert the affirmative defense set forth in *Burlington Industries*, they correctly held that no reasonable jury could find that the necessary elements for succeeding on the defense had not been met.

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff unreasonably failed to take advantage of any preventive or corrective action opportunities

> provided by the employer or to avoid harm otherwise.

Burlington Industries, 118 S. Ct. at 2270.

The district court in this matter found that based upon the evidence presented at trial a jury could have reasonably concluded that Ms. Watkins was subjected to a sexually hostile work environment. Ms. Watkins testified that Kelley raped her in the PSB offices. Although Ms. Watkins failed to report the assault when it occurred, and even when she did three months later only stated Kelley had fondled her, no evidence was offered directly challenging her testimony on this issue. Accordingly, PSB did not, and does not now, contest the fact that the jury could have concluded that Ms. Watkins was subjected to a sexually hostile work environment.

The irrefutable evidence below, however, and as recognized by the Fourth Circuit and the district court, overwhelmingly demonstrates that PSB exercised reasonable care to prevent and correct promptly Kelley's sexually harassing behavior, and that Ms. Watkins unreasonably failed to take advantage of the preventive or corrective action opportunities provided by PSB. Relying on the affirmative defense set forth by this Court in both *Burlington Industries* and *Faragher*, the Fourth Circuit was required to affirm the district court's opinion finding PSB not vicariously liable for the sexually hostile work environment to which a jury could have, and indeed did, find plaintiff was subject to while employed by PSB.

As noted by the Fourth Circuit, PSB presented overwhelming evidence satisfying the first requisite of the

affirmative defense — that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior. *Petitioner's Appendix at 42a-43a.* It is irrefutable that at the time of the assault, indeed at all relevant times, PSB had a written policy against sexual harassment. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.197.* There was a written company memorandum posted in the training room at PSB's office in Lutherville, Maryland stating that sexual harassment would not be tolerated. There also was a company employment handbook stating sexual harassment would not be tolerated. Although Ms. Watkins asserts she was never personally provided with a handbook — PSB asserts she was — it is uncontested that a copy of the handbook was at each post, including those where Ms. Watkins worked. Both the company memorandum and the handbook set forth the procedure for reporting complaints about sexual harassment, and provided the telephone "hot line" number to contact. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.65-A.67; A.198; A.500.*

When Ms. Watkins reported being fondled by Kelley, PSB immediately took steps to prevent and promptly correct any further harassing behavior. PSB immediately investigated the incident. Once Donald Nicola was advised by Hazel Dowling of the purported fondling, Nicola immediately traveled to where plaintiff was working at the time and interviewed her about the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.36-A.38; A.76.* Nicola then prepared a report and forwarded it up the chain of command to PSB Vice President of Operations Charles Fisher of the incident. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.44; A.77; A.573.* Once advised of the occurrence, Fisher

immediately began investigating the incident by meeting with and interviewing Hazel Dowling, and Kelley. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220;* A.222. Fisher eventually concluded the matter based upon: (1) receipt of a second report from Nicola stating that plaintiff advised she did not wish to pursue the matter; (2) plaintiff's failure to file a complaint with PSB's Human Resources Department per the written sexual harassment policy; (3) Kelley being out on disability and no longer in a position to affect plaintiff's employment or approach her in her employment capacity in any way; and (4) the fact that PSB had already made a decision to terminate Kelley for unrelated reasons. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.220.* It must be noted that at this time Ms. Watkins had stilled fail to advise anyone that she had been raped.

Petitioner sought to raise a claim that there had been prior complaint against Kelley by PSB employee Kia Odom. As pointed out by the United States Court of Appeals for the Fourth Circuit, however, the evidence revealed that Ms. Odom's complaint was made subsequent to the date Ms. Watkins claims she was assaulted. Moreover, once PSB became aware of Ms. Odom's complaint it exercised reasonable care to prevent and correct promptly any sexually harassing behavior.

> However, the evidence regarding Odom's complaint is scant at best, and what little evidence there is tends to support a conclusion that Odom made her allegations *after* Kelley raped Watkins. Obviously, PSB cannot have failed to exercise reasonable care to prevent harassment of Watkins by Kelley if it was unaware, prior to Kelley's rape

> of Watkins, that Kelley was a potential predator. *Cf. Brown*, 184 F.3d at 396 ("The law requires an employer to be reasonable, not clairvoyant or omnipotent."). More importantly, the record contains no evidence concerning the nature of Odom's allegations or PSB's response. The only relevant testimony was from Nicola, who stated that he responded to an inquiry from Fisher regarding the Odom matter. Far from bespeaking an indifference to allegations of sexual harassment, Nicola's testimony indicates PSB in fact investigated Odom's complaint. Accordingly, we conclude that no reasonable jury could find, based on the mere scintilla of evidence in the record, that PSB's handling of the Odom matter denoted a failure to take reasonable care to prevent and promptly correct sexual harassment.

Petitioner's Appendix at 44a (Footnote omitted).

Based on the foregoing the Fourth Circuit correctly held that PSB satisfied the first element of the affirmative defense to a claim of a sexually hostile work environment.

It is similarly uncontroverted that no reasonable jury could conclude that the second element of the affirmative defense — failure to take advantage of the preventive and corrective opportunities provided by PSB — was not established by PSB. Addressing the second prong of an employer's affirmative defense, this Court in *Burlington Industries* and *Faragher* stated:

> While proof that an employer had promulgated an anti-harassment policy with

> complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. *And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such a failure will normally suffice to satisfy the employer's burden under the second element of the defense.*

Burlington Industries, 118 S. Ct. at 2270; *Faragher*, 118 S. Ct. at 2292-2293. (Emphasis added.)

As previously set forth PSB had a sexual harassment complaint procedure in place when Ms. Watkins alleges Kelley assaulted her. Moreover, Ms. Watkins failed to avail herself of the complaint procedure. She did not report the assault at the time it happened; rather, she waited approximately three months. When she finally advised of the occurrence, she did not report what she later claimed occurred. Moreover, Ms. Watkins did not follow the procedure as outlined in the Company memorandum or the employee handbook. The Fourth Circuit correctly held that based upon the foregoing, no reasonable jury could conclude other than that Ms. Watkins failed to take advantage of the preventive and corrective opportunities provided by PSB. *Petitioner's Appendix at 44a-46a.*

> Here, there is no dispute that Watkins did not report the rape by Kelley pursuant to PSB's anti-

> harassment policy, which required that she contact the director of human resources. And, while Watkins told Dowling that Kelley had fondled her breasts and placed his hands down her pants, she repeatedly expressed her unwillingness to pursue the matter. Watkins testified that her failure to report the incident promptly and fully resulted from embarrassment and fear of reprisal. This evidence, however, is insufficient as a matter of law to establish that Watkins acted reasonably in failing to report Kelley according to the anti-harassment policy. *See Shaw*, 180 F.3d at 813 (holding that embarrassment and fear of retaliation do not justify failure to report harassment, reasoning that "[w]hile a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms"]. Accordingly, we hold that no reasonable jury could have concluded that PSB failed to establish the second prong of the affirmative defense.

Petitioner's Appendix at 45a-46a. (Footnotes omitted).

A footnote to the Fourth Circuit opinion aptly noted that even if Watkins' reporting of the harassment to Dowling were sufficient to establish that she took advantage of preventative opportunities, the result — PSB satisfying the affirmative defense — would be the same.

> Even if Watkins' disclosure of the harassment to Dowling were adequate to establish that she took

> advantage of available preventive or corrective opportunities, our result would be the same. Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment — as PSB did here, *see supra* note 11 — would be held liable for harassment on the basis of an inability to satisfy literal terms of the second element of the affirmative defense. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 265-266 (5th Cir. 1999); *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1369 (11th Cir. 1999) (Barkett, J., concurring specially) ("under the framework established by the Court in *Faragher* and *Burlington Industries*, a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII in cases where [there has been no tangible employment action]."). Such a result would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in Burlington Industries: to promote conciliation. *See Burlington Indus.*, 118 S. Ct. at 2270.

Based on the foregoing, the Fourth Circuit correctly held that PSB satisfied the second element of the affirmative defense to a claim of a sexually hostile work environment, and in favor of PSB on issue of PSB's liability on the claim of a sexually hostile work environment.

III. PSB UNEQUIVOCALLY EVIDENCED A LEGITIMATE NON-RETALIATORY REASON FOR ITS TERMINATION OF PETITIONER

The Fourth Circuit correctly affirmed the district court's granting PSB judgment as a matter of law on Ms. Watkins' retaliatory discharge claim. PSB offered a legitimate non-retaliatory reason for Ms. Watkins' ultimate discharge. Ms. Watkins was thereafter unable to offer any evidence whatsoever that the reasons set forth by PSB for her termination were a mere pretext for retaliation against her for complaining of sexual harassment.

In order to establish a prima facie case of retaliatory termination, a plaintiff must prove: (1) that she engaged in protected activity; (2) that the employer took adverse employment action against her; and (3) a causal connection existed between the protected activity and the adverse action. Once a plaintiff has evidenced these elements, the burden then shifts to the employer to establish a legitimate non-retaliatory reason for the adverse employment action taken against plaintiff. Once a non-retaliatory reason for the adverse employment action is demonstrated, the burden then shifts back to the plaintiff to evidence that the reason or reasons set forth by the employer were a mere pretext for retaliation. *See e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991); *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998).

PSB does not dispute that Ms. Watkins established a prima facie case of retaliation. Critical to this claim, however, and as held by the Fourth Circuit, is that Ms. Watkins failed to carry her burden of proof once PSB evidenced a legitimate

non-retaliatory basis for her termination. Specifically, Ms. Watkins failed to set forth any evidence whatsoever that the reasons set forth by PSB were a mere pretext for retaliating against her for complaining of sexual harassment. *Petitioner's Appendix at 46a-47a.*

PSB presented evidence at trial that unequivocally established that Ms. Watkins was terminated on September 16, 1996 because of poor job performance. Ms. Watkins was previously terminated in July 1996 for similar poor performance. Even if it were assumed that Ms. Watkins presented sufficient evidence from which a jury could have concluded a causal connection did exist between her complaining of sexual harassment and her termination on September 16, 1996,[1] PSB set forth legitimate, non-retaliatory reasons for her termination.

Ms. Watkins was initially terminated in July of 1996 for misconduct. The misconduct included arriving at work without a uniform, bringing her children to work, refusing to report for duty, and failing to call in when arriving and leaving shifts. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A.56; A.59-A.62; A.474-A.476; A.502.* Ms. Watkins was terminated in September 16, 1996 for gross misconduct. Misconduct, which was clearly articulated in the employee manual and directly resulted in PSB loosing the account to which plaintiff was assigned. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A.86-A.91; A.216-A.217; A.228-A.229; A.504.* Ms. Watkins was terminated for

1. The district court arguably found that Ms. Watkins did not evidence a causal connection between her reporting of the harassment and her ultimate firing. *See Petitioner's Appendix at 32a.*

locking the master set of keys for the elderly housing residence to which she was assigned in the TV room of the residence. Although plaintiff was not supposed to be in the room, it was reported that she had fallen asleep in the room. She then left the residence unguarded and went to the handyman's home to try and get him to open the room for the keys. Eventually the manager of the premises had to be called at 5:30 a.m. to unlock the room in which Ms. Watkins had left her keys. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441;A.89; A.228-A.229.* Under PSB's written employment policy, it was mandatory that employees who leave their post without permission be terminated. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A. 229-230; A.488.* Ms. Watkins previous termination in July, 1996 was for poor performance at the same site, including arriving at work without a uniform, bringing her children to work, refusing to report for duty, and failing to call in when arriving and leaving shifts. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.441; A.56; A.59-A.62; A.474-A.476; A.502.*

Ms. Watkins failed to set forth any evidence that PSB's termination of her in 1996 was based in any way on her complaint against Kelley. Her complaints to the police and EEOC followed her termination. Accordingly, the Fourth Circuit affirmed the district court's judgment as a matter of law for PSB on Ms. Watkins' retaliatory discharge claim notwithstanding the jury's verdict.

IV. PETITIONER'S PUNITIVE DAMAGES CLAIM WAS PROPERLY DISMISSED AS A MATTER OF LAW

Applying the analysis set forth in *Kolstad v. American Dental Association*, 527 U.S. 576 (1999), the district court properly dismissed Ms. Watkins' punitive damages claim as a matter of law and did not submit it to the jury. *Appendix Below In the United States Court of Appeals for the Fourth Circuit at A.437-A.441.* The Fourth Circuit correctly affirmed the district court's dismissal of the punitive damages claim given the dismissal of Ms. Watkins' substantive claims. *Petitioner's Appendix at 47a Fn.17.* PSB was entitled to judgment as a matter of law on the substantive claims rendering Ms. Watkins' punitive damages claim moot. The record is devoid of any evidence to infer reckless indifference or malice.

CONCLUSION

Based on the foregoing, this case does not merit further review by this Court and Ms. Watkins' Petition should be denied.

Respectfully submitted,

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